



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2019-0010; FRL-9997-97-Region 3]

**Approval and Promulgation of Air Quality Implementation Plans;
Delaware; Nonattainment New Source Review Requirements for 2008 8-Hour Ozone
Standard**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by Delaware. The revision is in response to EPA's February 3, 2017 Findings of Failure to Submit for various requirements relating to the 2008 8-hour ozone national ambient air quality standards (NAAQS). This SIP revision is specific to nonattainment new source review (NNSR) requirements. This action is being taken under the Clean Air Act (CAA).

DATES: This final rule is effective on **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2019-0010. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available

docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the “For Further Information Contact” section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Johansen, Permits Branch (3AD10), Air and Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2156. Ms. Johansen can also be reached via electronic mail at johansen.amy@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On April 19, 2019 (84 FR 16426), EPA published a notice of proposed rulemaking (NPRM) for Delaware. In the NPRM, EPA proposed approval of Delaware’s NNSR Certification for the 2008 8-hour ozone NAAQS. The formal SIP revision was submitted by the Department of Natural Resources and Environmental Control (DNREC) on behalf of the state of Delaware on June 29, 2018. Specifically, Delaware certified that its existing NNSR program, covering the Delaware portion of the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE (Philadelphia Area) nonattainment area (which includes New Castle County) and the entire Seaford, DE (Seaford Area) nonattainment area (which includes Sussex County) for the 2008 8-hour ozone NAAQS, is at least as stringent as the requirements at 40 CFR 51.165, as amended by the final rule titled “Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements” (SIP Requirements Rule), for ozone and its precursors.^{1,2}

¹ The SIP Requirements Rule addresses a range of nonattainment area SIP requirements for the 2008 8-hour ozone NAAQS, including requirements pertaining to attainment demonstrations, reasonable further progress (RFP), reasonably available control technology, reasonably available control measures, major new source review, emission inventories, and the timing of SIP submissions and of compliance with emission control measures in the SIP. The

See 80 FR 12264 (March 6, 2015). This SIP revision was in response to EPA's final 2008 8-hour ozone NAAQS Findings of Failure to Submit for NNSR requirements. See 82 FR 9158 (February 3, 2017).

On March 12, 2008, EPA promulgated a revised 8-hour ozone NAAQS of 0.075 parts per million (ppm). See 73 FR 16436 (March 27, 2008). Under EPA's regulations at 40 CFR 50.15, the 2008 8-hour ozone NAAQS is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentration is less than or equal to 0.075 ppm.

Upon promulgation of a new or revised NAAQS, the CAA requires EPA to designate as nonattainment any area that is violating the NAAQS based on the three most recent years of ambient air quality data at the conclusion of the designation process. The Seaford and Philadelphia Areas were classified as marginal nonattainment for the 2008 8-hour ozone NAAQS on May 21, 2012 (effective July 20, 2012) using 2008-2010 ambient air quality data. See 77 FR 30088. On March 6, 2015, EPA issued the final SIP Requirements Rule, which establishes the requirements that state, tribal, and local air quality management agencies must meet as they develop implementation plans for areas where air quality exceeds the 2008 8-hour ozone NAAQS. See 80 FR 12264. Areas that were designated as marginal ozone nonattainment areas were required to attain the 2008 8-hour ozone NAAQS no later than July 20, 2015, based on 2012-2014 monitoring data. See 40 CFR 51.1103. The Seaford Area attained the 2008 8-

rule also revokes the 1997 ozone NAAQS and establishes anti-backsliding requirements.

² On February 16, 2018, the United States Court of Appeals for the District of Columbia Circuit (D.C. Cir. Court or Court) issued an opinion on the EPA's SIP Requirements Rule. *South Coast Air Quality Mgmt. Dist. v. EPA*, 882 F.3d 1138, 2018 U.S. App.LEXIS 3636 (D.C. Cir. Feb. 16, 2018). The D.C. Cir. Court found certain provisions from the SIP Requirements Rule to be inconsistent with the statute or unreasonable and vacated those provisions. *Id.* The Court found other parts of the SIP Requirements Rule reasonable and denied the petition for appeal on those provisions. *Id.*

hour ozone NAAQS by July 20, 2015 and the EPA Administrator signed a final Determination of Attainment (DOA) on April 11, 2016. See 81 FR 26697 (May 4, 2016). The Philadelphia Area did not attain the 2008 8-hour ozone NAAQS by July 20, 2015; however, the area did meet the CAA section 181(a)(5) criteria, as interpreted in 40 CFR 51.1107, for a one-year attainment date extension. *Id.* Therefore, in same rulemaking action, the EPA Administrator signed a final rule extending the Philadelphia Area 8-hour ozone NAAQS attainment date from July 20, 2015 to July 20, 2016. *Id.*³

Based on initial nonattainment designations for the 2008 8-hour ozone NAAQS, as well as the March 6, 2015 final SIP Requirements Rule, Delaware was required to develop a SIP revision addressing certain CAA requirements for the Seaford and Philadelphia Areas, and submit to EPA a NNSR Certification SIP or SIP revision no later than 36 months after the effective date of the areas designations for the 2008 8-hour ozone NAAQS (i.e., July 20, 2015).⁴ See 80 FR 12264 (March 6, 2015). EPA is approving Delaware's June 29, 2018 NNSR Certification SIP revision for the 2008 8-hour ozone NAAQS.

II. Summary of SIP Revision and EPA Analysis

This rulemaking action is specific to Delaware's NNSR requirements. NNSR is a preconstruction review permit program that applies to new major stationary sources or major modifications at existing sources located in a nonattainment area. The specific NNSR requirements for the 2008 8-hour ozone NAAQS are located in 40 CFR 51.160 through 165.

³ On November 2, 2017, EPA approved a DOA for the 2008 8-hour ozone NAAQS for Philadelphia Area. This action was based on complete, certified, and quality assured ambient air quality monitoring data for the 2013-2015 monitoring period. See 82 FR 50814. It should be noted that a DOA does not alleviate the need for Delaware to certify that their existing SIP approved NNSR program is as stringent as the requirements at 40 CFR 51.165, as NNSR applies in nonattainment areas until an area has been redesignated to attainment.

⁴ Neither Delaware's obligation to submit the NNSR Certification SIP nor the requirements governing that submission were affected by the D.C. Circuit's February 16, 2018 decision on portions of the SIP Requirements Rule in *South Coast Air Quality Mgmt. Dist. v. EPA*.

Delaware's SIP approved NNSR program, established in Title 7 Delaware Administrative Code (DE Admin Code) 1125 (*Requirements for Preconstruction Review*), apply to the construction and modification of major stationary sources in nonattainment areas. In its June 29, 2018 SIP revision, Delaware certified that the version of Title 7 DE Admin Code Section 1125 approved in the SIP is at least as stringent as the Federal NNSR requirements for the Seaford and Philadelphia Areas.

In addition, on February 3, 2017, EPA found that 15 states and the District of Columbia failed to submit SIP revisions in a timely manner to satisfy certain requirements for the 2008 8-hour ozone NAAQS that apply to nonattainment areas and/or states in the Ozone Transport Region (OTR). See 82 FR 9158. As explained in that rulemaking action, consistent with the CAA and EPA regulations, these Findings of Failure to Submit established certain deadlines for the imposition of sanctions, if a state does not submit a timely SIP revision addressing the requirements for which the finding is being made, and for the EPA to promulgate a Federal implementation plan (FIP) to address any outstanding SIP requirements.

EPA found, *inter alia*, that Delaware failed to submit SIP revisions in a timely manner to satisfy NNSR requirements for the Seaford and Philadelphia Areas. Delaware submitted its June 29, 2018 SIP revision to address the specific NNSR requirements for the 2008 8-hour ozone NAAQS, located in 40 CFR 51.160 through 165, as well as its obligations under EPA's February 3, 2017 Findings of Failure to Submit. EPA's analysis of how this SIP revision addresses the NNSR requirements for the 2008 8-hour ozone NAAQS and the Findings of Failure to Submit was discussed in the NPRM and will not be restated here.

III. Public Comments and EPA Response

EPA received two sets of comments on the April 19, 2019 NPRM. See 84 FR 16426. One set of comments was in support of EPA's proposed rulemaking action. With respect to the second set of comments, only one comment is relevant to this action and requires a response. A summary of the comment and EPA's response is discussed in this Section. A copy of the comments can be found in the docket for this rulemaking action.

Comment: The commenter makes note that volatile organic compounds (VOC) are defined as those in 40 CFR 51.100(s), but that Delaware's regulations don't include the correct version of what is being defined as a VOC. The commenter references EPA's February 12, 2019 NPRM, where EPA is approving Delaware's definition change of VOC. The commenter also notes suggests that EPA should wait until Delaware's regulations match the requirements in 40 CFR 51.165 exactly before approving this NNSR submission and suggests EPA to look at Delaware's regulation 1125. Lastly, the commenter notes that changes have also been made to the rules governing the Prevention of Significant Deterioration (PSD) program and related modeling requirements.

EPA Response: Delaware's certification applies to its NNSR program, not to its PSD program. The commenter's concerns related to PSD and related modeling are not relevant to EPA's action to approve Delaware's NNSR certification, and as such do not warrant consideration in the final rule.

EPA finalized its approval of the NPRM that the commenter referred to in their comments. In that February 12, 2019 rulemaking action, EPA proposed approval of Delaware's revision to Section 2 of 7 DE Admin Code 1101, where the state updated its definition of VOC to conform

to EPA's current definition of VOC in 40 CFR 51.100(s). EPA finalized approval of that action on May 31, 2019. See 84 FR 25183.

EPA disagrees with the commenter's assertion that EPA should wait until Delaware's regulations match 40 CFR 51.165 exactly until it approves this rulemaking action. Delaware evaluated the necessary regulations for this rulemaking action and certified in its June 29, 2018 SIP revision that its existing Federally-approved NNSR program is at least as stringent as the Federal NNSR requirements found at 40 CFR 51.165, and based on EPA's analysis of that SIP revision, EPA agrees with Delaware and is moving forward to approve this rulemaking action.

IV. Final Action

EPA is approving Delaware's June 29, 2018 SIP revision addressing the NNSR requirements for the 2008 ozone NAAQS for the Seaford and Philadelphia Areas. EPA has concluded that Delaware's submission fulfills the 40 CFR 51.1114 revisions requirement, meets the requirements of CAA sections 110 and 172 and the minimum SIP requirements of 40 CFR 51.165, as well as its obligations under EPA's February 3, 2017 Findings of Failure to Submit. See 82 FR 9158.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those

imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of

judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action pertaining to Delaware's NNSR program and the 2008 8-hour ozone NAAQS may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 29, 2019.

Diana Esher,
Acting Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52--APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart I--Delaware

2. In §52.420, the table in paragraph (e) is amended by adding the entry "2008 8-Hour Ozone

Certification for Nonattainment New Source Review (NNSR)” at the end of the table to read as follows:

§52.420 Identification of plan.

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * * * *				
2008 8-Hour Ozone Certification for Nonattainment New Source Review (NNSR)	Delaware portion of the Philadelphia-Wilmington-Atlantic City, nonattainment area and the Seaford, Delaware nonattainment area	06/29/2018	[insert date of publication in the Federal Register], [insert Federal Register citation]	

[FR Doc. 2019-17128 Filed: 8/9/2019 8:45 am; Publication Date: 8/12/2019]